IN THE SUPREME COURT OF VIRGINIA.

CORE *v.* WILHELM.

Jan. 16, 1919.

[98 S. E. 27.]

1. **Trial (§ 156) (3)*)—Demurrer to the Evidence.**—On demurrer to plaintiff's evidence, the truth of the evidence and all just inference which a jury might draw therefrom must be admitted.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 522.]

2. **Municipal Corporations (§ 706 (6)*)—Automobile Collision—Negligence—Evidence.**—In action by pedestrian for personal injuries due to collision with automobile in charge of defendant at a street intersection, question of defendant's negligence held for the jury.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 415.]

3. **Municipal Corporations (§ 705 (2)*)—Use of Streets—Reciprocal Rights.**—The rights of a pedestrian and one operating automobile at a street crossing are equal and reciprocal.

[Ed. Note.—For other cases, see 16 Va.-W. Va. Enc. Dig. 170.]

4. **Municipal Corporations (§ 705 (10)*)—Automobile Collision—Duty of Pedestrian.**—The rule of look and listen applicable to grade crossings of steam railroads is not applicable to a pedestrian about to cross a street.

[Ed. Note.—For other cases, see 16 Va.-W. Va. Enc. Dig. 171.]

5. **Municipal Corporations (§ 705 (10)*)—Automobile Collision—Duty of Pedestrian.**—The nature of duty imposed upon a pedestrian about to cross a city street, where motor vehicles of all kinds are frequently passing, is to use such care as a person of ordinary prudence would use under like circumstances.

6. **Municipal Corporations (§ 706 (7)*)—Collision—Contributory Negligence—Question for Jury.**—Whether a pedestrian, injured while crossing a street where motor vehicles of all kinds are frequently passing, used the proper degree of care, is ordinarily a question for the jury.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 419.]

7. **Municipal Corporations (§ 706 (7)*)—Injury to Pedestrian—Contributory Negligence—Question for Jury.**—In action by pedestrian for personal injuries due to collision with automobile in charge of defendant at a street intersection, question of contributory negligence held for the jury.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 419.]

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

8. Municipal Corporations (§ 706 (3)*)—Injury to Pedestrian—Contributory Negligence—Burden of Proof.—In action by plaintiff pedestrian for personal injuries due to collision with automobile in charge of defendant at a street intersection, defendant had the burden of proving contributory negligence.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 406.]

9. Municipal Corporations (§ 706 (7)*)—Automobile Collision—Contributory Negligence—Demurrer to Evidence.—In the absence of evidence as to want of care by a pedestrian injured by an automobile, the jury would have been warranted in inferring that plaintiff was not negligent, and hence on demurrer to the evidence by the defendant the court must so find.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 522; 10 Va.-W. Va. Enc. Dig. 406.]

Error to Circuit Court of City of Norfolk.

Action by N. J. Wilhelm against Mrs. W. A. Core and another. Judgment against defendant named, and she brings error. Affirmed.

Baird & Swink, of Norfolk, for plaintiff in error.

Levy & Mitchell, of Norfolk, for defendant in error.

BURKS, J. This is an action to recover damages for a personal injury inflicted on the plaintiff by the defendant by striking him with an automobile at a street crossing in the city of Norfolk. The collision and the consequent injury to the plaintiff is not denied, but the defense is that the defendant was not negligent, or, if she was, that the plaintiff was also guilty of negligence proximately contributing to his injury. The defendant offered no evidence, but demurred to the evidence offered by the plaintiff. The jury assessed the plaintiff's damage at $2,000, and the court overruled the defendant's demurrer and entered up judgment on the verdict for the plaintiff. To that judgment this writ of error was awarded.

The collision occurred at a regular crossing of Granby street in the city of Norfolk, but the details of it are very meager. Only two witnesses testify as to what occurred at the time—the plaintiff and a policeman. The plaintiff was a Russian, who could neither understand nor speak the English language, and gave his testimony through the medium of an interpreter. He arrived in th city by boat from Newport News only a few hours before the accident, and, after walking up Granby street for some distance, was attempting to cross in quest of Church

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

street, to which he had been directed. His account of what occurred is that he went to the corner and attempted to cross Granby street, and proceeded as far as the first track of the street car line, when he was struck by the automobile which ran over his ankle and also badly injured one of his wrists. He says he looked just when he left the sidewalk, and that there was no automobile in that block, but that "there was an automobile in the other block;" that the latter was a long distance from him, and was far enough away for him to cross the track; that no gong was sounded or bell rung; and that he did not hear the machine approaching. On cross-examination, he states that he came from a city in Russia-Poland, where they have automobiles and street cars, that the whole street was empty, and that the automobile which struck him was the only one in the block at the time. When asked what part of the machine struck him, he replied, "If he could see it, he would run away from it." This is practically all of his testimony relating to the accident. His wounds were of quite a serious nature. The policeman's statement is that he could not tell how many machines were in the block at the time, but that he saw the defendant coming down Granby street at 5 minutes to 7 on November 2d; that she ran into the plaintiff and knocked him out into the street; that he "saw the man fall from the automobile;" that she never made any attempt to stop after striking him until he stopped her; that she did not go back with the machine to pick him up; and that he did not hear her blow a horn, or ring a gong. He estimated the distance of the scene of the accident from him at 150 feet. He also stated that the street lights were burning at the time. The defendant, who was called as witness for the plaintiff, admitted that she was operating an electric automobile which came in contact with the plaintiff on Granby street, Norfolk, Va., on November 2, 1916. The foregoing is the substance of the evidence demurred to, and is given largely in the language of the witnesses themselves.

[1, 2] Admitting the truth of this evidence and all just inferences which a jury might have drawn from it, as must be done on a demurrer to the evidence, the question is: Would a jury have been warranted in finding a verdict for the plaintiff? The rights of the parties at the crossing were equal and reciprocal, and it was the duty of each to look out for the other. The defendant saw, or ought to have seen, the plaintiff attempting to make the crossing, and it was her duty to have had her car under such control that she could have stopped it if necessary in order to have avoided the accident. The injury occurred at a corner where the defendant might reasonably have expected to encounter foot passengers crossing the street, and it was her

duty to keep a lookout for them. Her view was unobstructed —"there was no other automobile on the block"—and she had no right to endanger the lives or limbs of other people on the street whose rights in the street were equal to her own. She was operating an electric automobile, approaching a crossing which the plaintiff was upon and attempting to cross, and she saw or ought to have seen him, and yet gave no signal of her approach. There is no evidence of the speed at which she was driving, or that the speed was lessened. The jury would have been warranted, under these circumstances, in inferring that she did not have her car under such control as would have enabled her to have avoided the injury, and that she was negligent in its operation.

[3-6] The rights of the plaintiff and of the defendant at the crossing were equal and reciprocal. Neither had the right of way over the other, and each had the right to assume that the other would discharge the duty imposed upon him. The rule of "look and listen" applicable to grade crossings of steam railroads is not applicable to cases of this kind. The measure of duty imposed upon a pedestrian about to cross a city street, where motor vehicles of all kinds are frequently passing, is that he shall use such care as a person of ordinary prudence would use under like circumstances, and whether or not he did use such care is ordinarily a question for the jury. Va. Ry. & Power Co. *v.* Boltz, 122 Va. —, 95 S. E. 467. Of course, he cannot blindly or negligently expose himself to danger; but he is not required to be continuously looking and listening to ascertain if automobiles are approaching, under penalty that upon failure to do so, if he is injured, his negligence must be conclusively presumed. Hennessey *v.* Taylor, 189 Mass. 583, 76 N. E. 224, 3 L. R. A. (N. S.) 345, 4 Ann. Cas. 396; Shea *v.* Reems, 36 La. Ann. 966.

In Baker *v.* Close, 204 N. Y. 92, 97 N. E. 501, 38 L. R. A. (N. S.) 487, the negligence of the defendant was admitted, but there was conflict in the testimony as to the plaintiff's contributory negligence. In that case it was said:

"The footman is not required, as a matter of law, to look both ways and listen, but only to exercise such reasonable care as the case requires, for he has the right to assume that a driver will also exercise due care and approach the crossing with his vehicle under proper control. Buhrens *v.* Dry Dock, E. B. & B. R. Co., 53 Hun. 571 [6 N. Y. Supp. 224], affirmed 125 N. Y. 702 [26 N. E. 752]. At such street crossing both pedestrians and drivers are required to exercise that degree of prudence and care which the conditions demand. Brooks *v.* Schwerin, 54 N. Y. 343. It is impossible to formulate any more precise definition of these relative rights and duties."

In Minor *v.* Mapes, 102 Ark. 351, 144 S. W. 219, 39 L. R. A. (N. S.) 214, the facts were that the plaintiff alighted from a street car, at the front end of it, which was customary, and started across the track in front of the car to go to the opposite side of the street. He hesitated at first, but the motorman told him to go ahead, and he proceeded to cross. As he stepped beyond the end of the car, the automobile, which was running at 10 or 12 miles an hour, struck him and knocked him down. He was just stepping on the other track, about 4 feet from the end of the car, when the automobile struck him. It was a rainy day, and he had his umbrella raised and was walking rapidly. He testified that the street car obstructed the view down the street, and that as he passed the car he looked down the street, but did not see the automobile approaching, and failed to see it until too late to get out of the way. There was ample space between the street car and the other side of the street for the automobile to pass. It was there said:

"It cannot be held that the failure of a pedestrian upon a public street to look up and down the street before crossing constitutes, under all circumstances, negligence as a matter of law. There is no statute or rule of law which raises a presumption of negligence from the failure of a pedestrian, on a public street, not at a railroad crossing, to look. The rule is that a pedestrian, having equal rights with others to the use of the streets, must exercise ordinary care for his own safety, and this is generally a question for the jury to say whether such care has been exercised."

While the pedestrian must bear in mind the dangers he may encounter in the street, he is only bound to use such precautions for his own safety as the danger to be apprehended would reasonably suggest to a person of ordinary prudence.

[7, 8] In the case at bar it affirmatively appears that the plaintiff looked just as he started to cross the street, and the way appeared clear, as there was no automobile in the block. What, if any, further precautions he took for his safety, does not affirmatively appear from the evidence. The failure to take such precautions was a matter of defense, as to which the burden of proof was upon the defendant, unless it was disclosed by the plaintiff's evidence, or was fairly to be inferred from all the circumstances, for it is as much the duty of the defendant to show the negligence of the plaintiff as it is the duty of the plaintiff to show the negligence of the defendant. Southern R. Co. *v.* Bryant's Adm'r, 95 Va. 212, 28 S. E. 183, and cases cited.

[9] The instinct of self-preservation generally forbids the imputation of recklessness, and, in the absence of evidence as to the want of due care on the part of the plaintiff, the jury would

have been warranted in inferring that the plaintiff was not negligent, and hence, on a demurrer to the evidence by the defendant, we must so find. In Southern R. Co. *v.* Bryant's Adm'r, 95 Va. 212, 220, 28 S. E. 183, 185, this court, discussing the law applicable to an injury to a traveler at a grade crossing of a steam railroad, uses this language:

"If the defendant company relied upon contributory negligence on the part of the deceased to defeat a recovery by the plaintiff, it is well settled in this state, whatever may be the decisions elsewhere, that the burden was on the company to prove it, unless such negligence was disclosed by the evidence of the plaintiff, or might be fairly inferred from all the circumstances; and, in the absence of such proof, the person injured must be presumed to have been without fault. B. & O. R. Co. *v.* Whittington, 30 Grat. [71 Va.] 805; Balto. & O. R. Co. *v.* McKenzie, 81 Va. 71; Improvement Co. *v.* Andrew, 86 Va. 273 [9 S. E. 1015]; N. & W. R. Co. *v.* Gilman, 88 Va. 239 [13 S. E. 475]; Kimball & Fink *v.* Friend, 95 Va. 125 [27 S. E. 901]. See, also, R. Co. *v.* Horst, 93 U. S. 298 [23 L. Ed. 898]; R. Co. *v.* Gladmon, 15 Wall. 401 [21 L. Ed. 114]; and 2 Wood on Railroads, 1455.

"It cannot be inferred as a matter of law, under the circumstances disclosed by the record, that, because Bryant drove upon the track without stopping, he did not listen. The instinct of self-preservation forbids the imputation of recklessness to any one. Where a traveler is killed at a railroad crossing, and the negligence of the railroad company is established, in the absence of evidence to the contrary, the presumption is, though perhaps slight, that the traveler did his duty in approaching the crossing. Kimball & Fink *v.* Friend, supra. As has been aptly said by a learned author in discussing this question: 'One cannot fail to call to mind that contributory negligence is as distinctly a wrong in the plaintiff as negligence is in the defendant, and that it is as much against the principles of the law to presume it on the one side as on the other; resulting, therefore, in the conclusion that the defendant can no more avail himself of the one than can the plaintiff of the other.' Bishop on Noncontract Law, § 470."

In Southern Ry. Co. *v.* Jones' Adm'r, 118 Va. 685, 689, 88 S. E. 178, 180, it is held that—

"The inferences to be drawn from the evidence as to contributory negligence must be certain and incontrovertible, or they cannot be made by the court. If, under all the facts and circumstances of the case, it is a question about which reasonably fair-minded men may differ, it must be decided by the jury; and if

the jury might have found for the plaintiff, on the defendant's demurrer to the evidence, the court must so find."

See, also, Perkins *v.* Southern Ry. Co., 117 Va. 351, 85 S. E. 401; Saunders *v.* Southern Ry. Co., 117 Va. 396, 84 S. E. 650.

We find no error in the judgment of the circuit court, and it is therefore affirmed.

Affirmed.

Note.

Reciprocal Rights and Duties of Automobilists and Pedestrians at Street Crossings.—It is the unanimous holding of the American courts that the rights of automobilists and pedestrians at street crossings are equal and reciprocal. See Millsaps *v.* Brogdon, 97 Ark. 469, 134 S. W. 632; Brown *v.* Brashear, 22 Cal. App. 135, 133 Pac. 505; Brown *v.* Wilmington (Del.), 90 Atl. 44; Hannigan *v.* Wright, 5 Penn. (Del.), 537, 63 Atl. 234; O'Dowd *v.* Newnham, 13 Ga. App. 220, 80 S. E. 36; McLaughlin *v.* Griffin, 155 Iowa 302, 135 N. W. 1107; Bongner *v.* Ziegenhein, 165 Mo. App. 328, 147 S. W. 182; Dugan *v.* Lyon, 41 Pa. Super. Ct. 52; Vesper *v.* Lavender (Tex. Civ. App.), 149 S. W. 377; Aiken *v.* Metcalf (Vt.), 97 Atl. 669; Minor *v.* Stevens, 65 Wash. 423, 118 Pac. 313, 2 N. C. C. A. 309, 42 L. R. A. (N. S.) 1178; Deputy *v.* Kimmell, 73 W. Va. 595, 80 S. E. 919.

"The pedestrian and the automobile have equal rights upon the highway, but their capacity for inflicting injury is vastly disproportioned. It follows also from this that the driver of an automobile cannot be said to be using the highway within his rights, or to be in the exercise of due care, if he takes advantage of the force, weight, and power of his machine as a means of compelling pedestrians to yield to his machine superior rights upon the public highway designed for the use of all members of the public upon equal terms. Instances are almost a matter of daily occurrence where apparently the drivers of automobiles operate their machines as if they have been granted a right of way over the public highways and as if it is nothing more than the duty of the pedestrian to yield precedence to the automobile, and to stop and wait until the automobile has passed before attempting to proceed in crossing a street or otherwise using the highway. If there is anything in the argument of priority, man was created before the automobile, and, to paraphrase a quotation from Holy Writ, man was not created for the automobile, but the automobile was created for man. * * * Automobiles have no monopoly of the public highways, nor any priority of right in their use." O'Dowd *v.* Newnham, 13 Ga. App. 220, 226, 231, 80 S. E. 36.

The loud blowing of a horn does not give to the motor vehicle any exclusive right of way. Rasmussen *v.* Whipple (Mass.), 98 N. E. 592, 593.

Both Must Exercise Reasonable Care.—Automobilists and pedestrians are required to exercise ordinary care to use the street with a reasonable regard for the safety and convenience of the other. Vesper *v.* Lavender (Tex. Civ. App.), 149 S. W. 377, writ of error denied, 106 Tex. 658, no opinion. Brown *v.* Wilmington (Del.), 90 Atl. 44.

Such care must be in proportion to the danger or the peculiar risks in each case. Brown *v.* Wilmington (Del.), 90 Atl. 44.

"What is prudence in one case may be negligence in another, reck-

lessness in another, and downright foolhardiness in still another. The farmer on a back and unfrequented highway is not held to the same degree of vigilance when he crosses the road to his barn as is the man who attempts to cross a busy city street crowded with traffic. The circumstances and dangers are always to be taken into account in determining what is due care or the evidence of it." Aiken *v.* Metcalf (Vt.), 97 Atl. 669, 670.

"Greater care is required at street crossings and in the more crowded streets of a city than in the less obstructed streets in the open or suburban parts. There is a like duty of exercising reasonable care on the part of the pedestrian. The person having the management of the vehicle and the traveler on foot are both required to use such reasonable care as the circumstances of the case demand, an exercise of greater care on the part of each being required where there is an increase of danger. The right of each must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the rights of the other, and both are bound to the reasonable use of all their senses for the prevention of accident, and the exercise of all such reasonable caution as ordinarily careful and prudent persons would exercise under like circumstances. Grier *v.* Samuel, 86 Atl. 209, 211." Brown *v.* Wilmington (Del.), 90 Atl. 44, 46.

"Generally the natural instinct of self-preservation will inspire in the pedestrian a due degree of caution for his own safety, when he is aware of the approach of an automobile; and this the law will require him to exercise. Sometimes the circumstances surrounding the approach of one of these vehicles of ponderous proportions inspire a terror which paralyzes the power of locomotion on the part of the traveler on foot, especially if he be a child of tender years. In such a case the dangerous character of the instrumentality which the driver of an automobile is operating forbids the assertion that he has exercised even ordinary diligence, unless he has used every possible means to avoid injury to the pedestrian. On account of the ease with which injury can result from the slightest negligence or inattention in the operation of his machine, ordinary diligence requires that the driver of an automobile be constantly on the lookout, and that he have his machine in such condition as that it shall be under his perfect control. The pedestrian also is required to be on the lookout, but he has the right to assume that the drivers of all automobiles are on the lookout for him too; and if he is properly upon the public highway, which he is entitled to use equally with them, he has the right to assume that they are both willing and able to regard his rights. While, therefore, the law requires that a pedestrian and the driver of an automobile shall each anticipate the presence of the other upon the public highways, and that neither shall do any act likely to jeopardize the safety of the other, still, on account of the great disparity in their respective capacities to inflict injury, the exercise of ordinary diligence on the part of the pedestrian to look out for automobiles does not necessarily require as continuous caution as is requisite to enable an automobile to fulfill the definition of 'ordinary diligence,' as applied to one having in his charge a dangerous and death-dealing instrumentality." O'Dowd *v.* Newnham, 13 Ga. App. 220, 226, 80 S. E. 36.

While a pedestrian crossing a street may presume that the driver of an approaching automobile will use ordinary care to avoid injuring him, and that the automobile will be operated with such care as ordinary prudence requires under all the circumstances, yet he

is required to use ordinary care to avoid being injured by contact with automobiles, and if he knows that a car is being operated in a negligent or unlawful manner, a special duty is imposed on him to use such ordinary care as a reasonably prudent man would in view of the increased danger. Rump *v.* Woods, 50 Ind. App. 347, 98 N. E. 369.

"The wayfaring man has a right to assume, nothing to the contrary appearing, that the automobile driver will obey the law. Buscher *v.* N. Y. Trans. Co., 106 App. Div. 493, 94 N. Y. Supp. 798; Kathmeyer *v.* Mehl (N. J.), 60 Atl. 40." Aiken *v.* Metcalf (Vt.), 97 Atl. 669, 670.

Crippled and Blind Persons and Infants.—The rule that pedestrians have equal and reciprocal rights and duties with automobile driver at street crossings applies to persons who are crippled, blind or of tender years.

"The beggar on his crutches has the same right to the use of the streets of the city as has the man in his automobile. Each is bound to the exercise of ordinary care for his own safety and the prevention of injury to others in the use thereof. Hot Springs Street Railroad Co. *v.* Hildreth, 72 Ark. 573, 82 S. W. 245; Hannigan *v.* Wright, 5 Pennewill (Del.), 537, 63 Atl. 234; Simeone *v.* Lindsay, 6 Pennewill (Del.), 224, 65 Atl. 778." Millsaps *v.* Brogdon, 97 Ark. 469, 134 S. W. 632, 633.

While a blind person has the same rights on a public street as any other, the fact of being blind does not excuse him from using the degree of care that an ordinary prudent person would exercise under the circumstances, and the fact of blindness requires a greater use of the other senses to discover, if possible, whether an automobile is approaching the street over which he is crossing. McLaughlin *v.* Griffin, 155 Iowa 302, 135 N. W. 1107.

"If * * * defendant, could by the use of ordinary care have discovered that plaintiff was blind, then it was defendant's duty to stop his machine upon discovering that fact in order to prevent the accident, and, if he failed to do so, he was guilty of negligence. This is the rule as to infants (Walters *v.* Railroad, 41 Iowa 71; Thomas *v.* Railroad, 114 Iowa 169, 86 N. W. 259; Burg *v.* Railroad, 90 Iowa 106, 57 N. W. 680, 48 Am. St. Rep. 419), and we think the same rule should apply to one who is blind." McLaughlin *v.* Griffin, 155 Iowa 302, 135 N. W. 1107, 1110.

In determining the contributory negligence of a young boy who was killed by an automobile, his conduct must be measured by that of an ordinarily prudent boy of the same age. Rasmussen *v.* Whipple (Mass.), 98 N. E. 592; Deputy *v.* Kimmell, 73 W. Va. 595, 80 S. E. 919.

Duty to "Look and Listen."—It is also unanimously held that the rule of "look and listen" applicable to railroad crossings does not apply to pedestrians about to cross a street. See Barbour *v.* Shebor, 177 Ala. 304, 58 So. 276; Adler *v.* Martin, 179 Ala. 97, 59 So. 597; Bachelder *v.* Morgan, 179 Ala. 339, 60 So. 815; Millsaps *v.* Brogdon, 97 Ark. 469, 134 S. W. 632, 32 L. R. A. (N. S.) 1177; Goldblatt *v.* Brocklebank, 166 Ill. App. 315; Williams *v.* Benson, 87 Kan. 421, 124 Pac. 531; Bongner *v.* Ziegenhein, 165 Mo. App. 328, 147 S. W. 182; Jessen *v.* J. L. Kesner Co., 159 App. Div. 898, 144 N. Y. Supp. 407; Vesper *v.* Lavender (Tex. Civ. App.), 149 S. W. 377, 378; Deputy *v.* Kimmell, 73 W. Va. 595, 80 S. E. 919.

"The courts have uniformly held that one who is operating an automobile upon the streets of a city must keep a constant lookout in

anticipation of pedestrians, but that a pedestrian is not bound to be continually looking and listening to ascertain if auto-cars are approaching, under penalty that if he fails to do this and is injured, it must be presumed from this fact alone that he was negligent. Weil *v.* Kreutzer, 134 Ky. 563, 121 S. W. 471, 24 L. R. A. (N. S.) 557; Thies *v.* Thomas, 77 N. Y. Supp. 276; Bradley *v.* Jaeckel, 119 N. Y. Supp. 1071; Gregory *v.* Slaughter, 124 Ky. 345 (99 S. W. 247, 124 Am. St. R. 402); Irwin *v.* Judge, 81 Conn. 492 (71 Atl. 572); Towle *v.* Morse, 103 Me. 250 (68 Atl. 1044); Simeone *v.* Lindsay (Del.), 65 Atl. 778; Hannigan *v.* Wright, 5 Pennew. (Del.), 537, 63 Atl. 236; McFern *v.* Gardner, 121 Mo. App. 1, 19; Hennessey *v.* Taylor, 189 Mass. 583 (76 N. E. 224, 3 L. R. A. [N. S.] 345); Tiffany *v.* Drummond, 168 Fed. 47; 14 Am. Dig., Decennial Edition, 1787 et seq.; Huddy on Automobiles, §§ 47, 95, et seq.; Babbitt on Motor Vehicles, §§ 244, 268, et seq." O'Dowd *v.* Newnham, 13 Ga. App. 220, 228, 80 S. E. 36.

"The look and listen rule (Baker *v.* Close, 204 N. Y. 92, 97 N. E. 501, 38 L. R. A. [N. S.] 487), and the constant vigilance rule (Gerhard *v.* Ford Motor Co., 155 Mich. 618, 119 N. W. 904, 20 L. R. A. [N. S.] 232; Hennessey *v.* Taylor, 189 Mass. 583, 76 N. E. 224, 3 L. R. A. [N. S.] 345, 4 Ann. Cas. 396; Lynch *v.* Fisk Rubber Co., 209 Mass. 16, 95 N. E. 400; Graham *v.* Hagmann, 270 Ill. 252, 110 N. E. 337), do not apply to a pedestrian using the public highway." Aiken *v.* Metcalf (Vt.), 97 Atl. 669, 670.

In discussing this question the Supreme Court of Alabama in Barbour *v.* Shebor, 177 Ala. 304, 58 So. 276, 277, said: "There is no warrant in law for such application. A railroad acquires a right of way for the express purpose of running trains at a rapid rate of speed over the same, and travelers on the public highways, knowing this fact, are required to observe due caution in approaching the tracks. Even as to street railroads, the tracks mark the line of danger, so that the pedestrian knows just where to look and how to avoid the point of peril; but automobiles have no special privileges in the streets, more than other vehicles. They simply travel upon the streets with the same privileges and obligations as other vehicles, and the mere fact that they can run faster than other vehicles does not give them any right to run at a dangerous rate of speed, any more than the fact that one man drives a race horse gives him a right to travel the streets at a higher rate of speed than another who drives a plug. The simple rule is that drivers on the streets and pedestrians, each recognizing the rights of the other, are required to exercise reasonable care. Hennessey *v.* Taylor, 189 Mass. 583, 76 N. E. 224, 3 L. R. A. (N. S.) 345, 4 Ann. Cas. 396, and notes; Buscher *v.* N. Y. Transp. Co., 106 App. Div. 493, 94 N. Y. Supp. 798; Caesar *v.* Fifth Avenue Coach Co., 45 Misc. Rep. 331, 90 N. Y. Supp. 359; Kathmeyer *v.* Mehl (N. J.), 60 Atl. 40; Berry, Law on Automb., § 124, p. 113; Id., § 171, p. 166."

"When a pedestrian is about to cross a street he must use the care of a prudent man, but the law does not undertake to further define this standard. The law does not say how often he must look, or precisely how far, or when or from where. Knapp *v.* Barrett, 216 N. Y. 226, 110 N. E. 428. 'It cannot be laid down as a rule,' says the court in Undehejem *v.* Hasting, 38 Minn. 485, 38 N. W. 488, 'that in all cases, without regard to the extent to which the street is usually traveled, it is negligence for one on foot to cross it, or walk in it, without looking in each direction to see if a vehicle may be approaching. To do so upon a crowded city street,

where vehicles, driven rapidly, pass each way every instant, and where the crowd of vehicles prevent the drivers seeing readily a person on foot in a part of the street other than the crossings, and where, consequently, danger is nearly always present, might be so patently negligent that a reasonable mind could come to but one conclusion; while it would be otherwise if the street were but little frequented. In the latter case it might or might not be negligent, depending on other circumstances; such, for instance, as the length of time spent in the street without looking around.' And this expresses the settled law of the subject. Orr *v.* Garrabold, 85 Ga. 373, 11 S. E. 778; Hennessey *v.* Taylor, supra; Baker *v.* Close, 204 N. Y. 92, 97 N. E. 501, 38 L. R. A. (N. S.) 487; Adler *v.* Martin, 179 Ala. 97, 59 South. 597; Lynch *v.* Fisk Rubber Co., 209 Mass. 16, 95 N. E. 400; Rump *v.* Woods, 50 Ind. App. 347, 98 N. E. 369; Deputy *v.* Kimmell, 73 W. Va. 595, 80 S. E. 919, 51 L. R. A. (N. S.) 989." Aiken *v.* Metcalf (Vt.), 97 Atl. 669, 670.

While crossing a street, a pedestrian's conduct with respect to due care in looking and listening may under certain circumstances be negligence of so pronounced a character that it could be declared negligence as a matter of law. Thus it may be conceded that if a pedestrian steps suddenly from a sidewalk into the street directly in front of an automobile, that is, into a plain and obvious danger—and is hurt, he ought not to recover. Vesper *v.* Lavender (Tex. Civ. App.), 149 S. W. 377, 378, writ of error denied, 106 Tex. 658, no opinion.

Duty to Run to Escape Injury.—"A pedestrian who, in using a public highway, is in the exercise of due care for his own protection and for the safety of others cannot, as a matter of law, be held to be guilty of contributory negligence merely because he does not run to escape injury by an automobile." O'Dowd *v.* Newnham, 13 Ga. App. 220, 231, 80 S. E. 36.

B. S.